

The Great Seal of the State of Arizona is a circular emblem. The outer ring contains the text "GREAT SEAL OF THE STATE OF ARIZONA" at the top and "1912" at the bottom, flanked by two stars. The inner circle features a shield with a landscape scene: a person stands on the left, a river flows through the center, and a mountain range is in the background. Above the shield is a banner with the Latin motto "DITAT DEUS".

Appeals Board No. T-1018221-001-B

In the Matter of:

X STATE OF ARIZONA ESA - TAX UNIT
% ROBERT DUNN III,
ASSISTANT ATTORNEY GENERAL
1275 W WASHINGTON ST - CFP/CLA
PHOENIX, AZ 85005-2926

Employer

Department

DECISION
AFFIRMED

THE **EMPLOYER** petitions for a hearing from a Decision Letter of the Department issued on August 15, 2006, which stated:

... that the Notice of Estimated Assessment for Delinquent Reports issued on April 11, 2006 for the quarters ending December 31, 2004, September 30, 2005 and December 31, 2005 is final and binding on X because the reports were not filed within the statutory period of 15 days.

The Employer filed a timely petition for hearing from the Department's Decision. The Appeals Board has jurisdiction in this matter pursuant to A.R.S. §§ 23-724(B), 23-672(D), and 23-738(B).

THE APPEALS BOARD gave notice to the parties, and held a telephone hearing before ROBERT T. NALL, an Administrative Law Judge, at **2:00 p.m.**, Mountain Standard Time, on **Wednesday, December 13, 2006.**

The issues noticed for hearing were the following:

- A. Whether the Employer's petition for reassessment of the Department's delinquency assessment issued on April 11, 2006, was timely filed as permitted by provi-

sions of A.R.S. §23-738(B) and Arizona Administrative Code, Section R6-3-1404.

- B. Whether the Department's delinquency assessment issued on April 11, 2006, has become final and the lien imposed by A.R.S. §23-745 has attached, pursuant to A.R.S. §23-738(B) and Arizona Administrative Code, Section R6-3-1404.
- C. Whether statutory authority exists to grant the requested waiver of interest and penalties and, if authority to do so exists, whether not granting the requested waiver was an abuse of that discretion.

The Employer did not appear at the scheduled hearing. The Assistant Attorney General appeared, and two witnesses for the Department testified at the hearing. Twelve Board Exhibits were admitted into evidence.

THE APPEALS BOARD FINDS the facts pertinent to the issue before us and necessary to our decision are:

1. A Notice of Estimated Assessment for Delinquent Reports was sent by certified mail on April 11, 2006, to the Employer's last known address of record, for each of the quarters ending December 31, 2004; September 30, 2005; and December 31, 2005. The Notice advised the Employer that the assessment would become final unless a petition for reassessment was filed with the Department within 15 days of the Notice. The Notice also stated that the assessment would be cancelled if all delinquent reports indicated on the Notice were properly completed and submitted within 15 days of the notice. (Bd. Exh. 9).
2. On May 30, 2006, the Employer filed three Unemployment Tax and Wage reports (UC-018) bearing a date of May 17, 2006. The Employer also filed a separate letter on May 30, 2006, requesting waiver of "... the interest and penalties". The Employer described the late and delayed filing as "... just a major oversight". (Bd. Exhs. 5-8).
3. On August 15, 2006, the Department issued a decision advising the Employer that the Notice of Estimated Assessment for Delinquent Reports was final and binding because the petition for reassessment was not filed within the required statutory period. (Bd. Exh. 4).
4. By letter postmarked August 25, 2006, the Employer filed a timely petition for review of the Department's decision denying the reassessment. (Bd. Exh. 3).

Arizona Revised Statutes § 23-738(B) provides:

- B. An employer against whom any delinquency assessment is made may petition for reassessment within fifteen days after written notice of the assessment is served personally or sent by certified mail to the employer's last known address. If the petition for reassessment is not filed within fifteen days the amount of the assessment shall become final and the lien imposed by § 23-745 shall attach.

In this case, the Employer could have filed a response, if the delinquent reports were filed within fifteen days after April 11, 2006. The Employer did not file any response until May 30, 2006, which is not within the 15-day time period permitted by law. The Employer did not appear at the hearing to explain any “extenuating circumstances” for the delay (Bd. Exh. 3A). The Employer did not file any additional documents for consideration by the Appeals Board. The only potential explanation advanced by the Employer was that the owner’s mother had been diagnosed with cancer in November of 2004, and office procedures were not monitored until after her passing on April 19, 2006.

I am very sorry that we let this get out of hand this way. I have some internal problems in my office that are just now coming to light. ... [After] April 19th 2006, and then as we started to get things back to normal that was when we noticed that a lot of things that I was told was being taken care of wasn’t. (Bd. Exh. 5).

Arizona Revised Statutes § 23-738(B) is unambiguous, declaring that: “If the petition for reassessment is not filed within fifteen days the amount of the assessment shall become final and the lien imposed by § 23-745 shall attach.” In the absence of a timely petition for reassessment, the Appeals Board is without authority to consider the merits of this matter. In addition, the Employer has presented no legal authorities that would permit the Department, or the Appeals Board, to “... waive the interest and penalties on our account and amend the estimated tax to be the actual tax per attached reports.” (Bd. Exh. 5).

The Arizona Court of Appeals has addressed the issue of timeliness of appeal from a prior determination, and has taken the position that the statutory prerequisites must be observed if an appeal is to be considered timely.

In *Wallis v. Arizona Department of Economic Security*, 126 Ariz. 582, 617 P. 2d 534 (Ariz. App. 1980) the court, interpreting A.R.S. § 23-773(B), held that

a determination issued by a claims deputy becomes "final" unless there is a timely appeal to that determination. The Court stated:

We must assume that the legislature meant what it said, and therefore hold that where the statutory prerequisites for finality to a deputy's determination are established, that decision becomes "final", unless a timely appeal is perfected.

In *Banta v. Arizona Department of Economic Security*, 130 Ariz. 472, 636 P.2d 1254 (Ariz. App. 1981) the court addressed virtually the identical issue before us in this case, i.e., an untimely request for reconsideration under A.R.S. § 23-724(A). In that decision the Court ruled:

... We therefore hold that a liability determination becomes final fifteen days after written notice is served personally or by certified mail addressed to the last known address of the employing unit, unless within this time the unit files a written request for reconsideration.

Arizona Administrative Code, Section R6-3-1404 provides in pertinent part as follows:

- A. Except as otherwise provided by statute or by Department regulation, any payment, appeal, application, request, notice, objection, petition, report, or other information or document submitted to the Department shall be considered received by and filed with the Department:
 - 1. If transmitted via the United States Postal Service or its successor, on the date it is mailed as shown by the postmark, or in the absence of a postmark the postage meter mark, of the envelope in which it is received; or if not postmarked or postage meter marked or if the mark is illegible, on the date entered on the document as the date of completion.
 - 2. If transmitted by any means other than the United States Postal Service or its successor, on the date it is received by the Department.
- * * *
- B. The submission of any payment, appeal, application, request, notice, objection, petition, report, or other information or document not within the specified statutory or regulatory period shall be considered

timely if it is established to the satisfaction of the Department that the delay in submission was due to: Department error or misinformation, delay or other action of the United States Postal Service or its successor, or when the delay in submission was because the individual changed his mailing address at a time when there would have been no reason for him to notify the Department of the address change.

1. For submission that is not within the statutory or regulatory period to be considered timely, the interested party must submit a written explanation setting forth the circumstances of the delay.
2. The Director shall designate personnel who are to decide whether an extension of time shall be granted.
3. No submission shall be considered timely if the delay in filing was unreasonable, as determined by the Department after considering the circumstances in the case.

* * *

- C. Any notice, report form, determination, decision, assessment, or other document mailed by the Department shall be considered as having been served on the addressee on the date it is mailed to the addressee's last known address if not served in person. ... [Emphasis added].

Here, the Employer has asserted no reason for the late filing of the petition for reassessment which, if accepted as true, would establish a condition which would cause the Board to consider the request timely.

The court in *Banta, supra*, also addressed the application of Arizona Administrative Code, Section R6-3-1404(B), stating:

The appellants have not established that their untimely request for reconsideration was the result of post office delay or other action. Their untimeliness, consequently, was inexcusable.

The evidence establishes that no petition for reassessment of the Notices of Estimated Assessment for Delinquent Reports issued on April 11, 2006, for the quarters in question was filed within the time prescribed by A.R.S. § 23-738(B). The Employer filed three quarterly reports bearing the date, May 17, 2006. The

Employer's undated letter and the reports were filed on May 30, 2006, which was beyond the appeal period. A petition filed outside the statutory period may be considered timely only if the untimely filing is due to Department error or misinformation, postal error, or a change of address when there is no reason to notify the Department of the change.

Based upon the evidence before us, the Appeals Board concludes that the Employer failed to timely file a petition for reassessment of the Notices of Estimated Assessment for Delinquent Reports issued on April 11, 2006. The Employer is not entitled to a hearing on the merit issues in this matter. Accordingly,

THE APPEALS BOARD **AFFIRMS** the Department's Decision of August 15, 2006.

The Notices of Estimated Assessment for Delinquent Reports issued on April 11, 2006, are final and binding on the Employer for the quarters ending December 31, 2004; September 30, 2005; and December 31, 2005.

DATED:

APPEALS BOARD

MARILYN J. WHITE, Chairman

HUGO M. FRANCO, Member

WILLIAM G. DADE, Member

PERSONS WITH DISABILITIES: Under the Americans with Disabilities Act, the Department must make a reasonable accommodation to allow a person with a disability to take part in a program, service, or activity. For example, this means that if necessary, the Department must provide sign language interpreters for people who are deaf, a wheelchair accessible location, or enlarged print materials. It also means that the Department will take any other reasonable action that allows you to take part in and understand a program or activity, including making reasonable changes to an activity. If you believe that you will

not be able to understand or take part in a program or activity because of your disability, please let us know of your disability needs in advance if at all possible. Please contact the Appeals Board Chairman at (602) 229-2806.

RIGHT TO FURTHER REVIEW BY THE APPEALS BOARD

Pursuant to A.R.S. § 23-672(F), the final date for filing a request for review is _____.

INSTRUCTIONS FOR FILING A REQUEST FOR REVIEW OF THE BOARD'S DECISION

1. A request for review must be filed in writing within 30 calendar days from the mailing date of the Appeals Board's decision. A request for review is considered filed on the date it is mailed via the United States Postal Service, as shown by the postmark, to any public employment office in the United States or Canada, or to the Appeals Board, 1140 E. Washington, Box 14, [Suite 104], Phoenix, Arizona 85034. Telephone: (602) 229-2806. A request for review may also be filed in person at the above locations or transmitted by a means other than the United States Postal Service. If it is filed in person or transmitted by a means other than the United States Postal Service, it will be considered filed on the date it is received.
 2. Parties may be represented in the following manner:

An individual party (either claimant or opposing party) may represent himself or be represented by a duly authorized agent who is not charging a fee for the representation; an employer, including a corporate employer, may represent itself through an officer or employee; or a duly authorized agent who is charging a fee may represent any party, providing that an attorney authorized to practice law in the State of Arizona shall be responsible for and supervise such agent.
 3. The request for review must be signed by the proper party and must be accompanied by a memorandum stating the reasons why the appeals board's decision is in error and containing appropriate citations of the record, rules and other authority. Upon motion, and for good cause, the Appeals Board may extend the time for filing a request for review. The timely filing of such a request for review is a prerequisite to any further appeal.
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A copy of the foregoing was mailed on
to:

(x) Er: X

Acct. No: X

(x) ROBERT DUNN III
Assistant Attorney General
1275 W Washington St
Phoenix, AZ 85007-2926

(x) JOHN NORRIS, Chief of Tax
Employment Security Administration
P O Box 6028 - 911B
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By: _____
For The Appeals Board